

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2124

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PFS

Docket No. 77-2124

JAMES CONNELL EDEN,

Appellant,

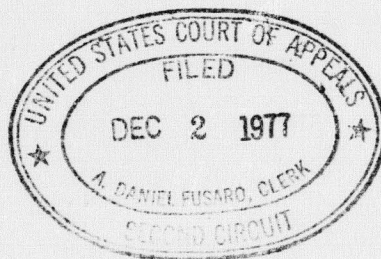
-against-

ROBERT H. KUHLMAN, Superintendent,
Woodbourne Correctional Facility,

Appellee.

On Appeal From a Judgment From the United States
District Court for the Eastern District of New York

APPELLANT'S BRIEF



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STATEMENT OF FACTS

This appeal is from a dismissal of a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254. The appellant, tried for murder and convicted of manslaughter, pleads in a pro se petition, that he is the victim of trial by trick and ambush in that the prosecutor actively deluded his counsel into preparing to meet evidence on the People's theory. That theory was exposed at each level of the prosecution, and then, mid-trial, was changed by the prosecution when it was too late for the defense to meaningfully prepare and respond.

On May 7, 1971 in the late afternoon, Henry Jenkins, Jr. was found in a pool of blood (T89)¹ stabbed frontally through two ventricles of his heart (T80).² Upon investigation, it was discovered that some time before the discovery of his dying body he had been involved in an altercation with the appellant herein several blocks away.

The case was a circumstantial one, not strong by any measure. Thirty eight days after the murder, James Eden, the appellant, was arrested. The case was so weak that it was dismissed on August 8, 1971 after a preliminary hearing

¹References in this brief are T - Trial Transcript, HT - Hearing Transcript, and App. - Appendix.

²Testimony at trial by the medical examiner indicated a strong probability that were the deceased stabbed at the scene of the altercation he could not have run to where he was found. (T80-83).

in Kings County Criminal Court. Testimony at the preliminary hearing through the only witness presented, Linda Townsend, indicated that through her window she saw James Eden, who she knew as Carnel Quick, pull a knife (HT-12) and wave it at the deceased (HT-13). She viewed the entire incident and saw no stabbing (HT-23) but she did see the deceased kicked while on the ground by another man, who joined the fray after it had commenced. That man was unarmed.

Notwithstanding the dismissal, Eden was indicted and ultimately arraigned.³ The record is vague as to whether there was any other testimony in the grand jury other than the testimony of this witness at the preliminary hearing, but on trial no grand jury minutes were produced for any other witness who testified. The matter came to trial on an indictment which charged that, "The defendant. . . caused the death of Henry Jenkins, Jr., by stabbing him. . . ." (App. A-37).

The People opened as the New York Statute requires them to do (McKinney Code of Criminal Procedure 260.30) and announced in essence for the jury, the court and counsel that the People would prove that James Eden stabbed Henry Jenkins, Jr. (T55-58). Relying on the expected Townsend testimony, the prosecutor said:

³For a chronology of delay, as it may be germane to this appeal, which does not raise the speedy trial question raised below, see the memorandum opinion of Justice Kern, reproduced at App. A-30).

"In addition the people will call a gentleman by the name of Otis Warney. Otis Warney will tell you that he was in the area. He will tell you where he was that evening on May 7th, and he saw a relative of his, Henry Jenkins, Jr., and he saw someone stab his relative, Henry Jenkins Jr. . . ." (T57).

The Assistant District Attorney was fully aware at the time of his opening that he would have another witness whose testimony would permit him to change his theory to acting in concert (T192). Nonetheless, he deliberately created the impression the testimony of this witness (Warney) to be consistent with that of Linda Townsend and the theory that James Eden acted as a principal. (T57).

Townsend's testimony at trial was unchanged once her recollection was refreshed by reference to her prior testimony (T215-245). Warney's⁴ testimony, however, is in sharp conflict with her's on several crucial points. When he came on the scene, two men, neither of whom he could identify at the time or at trial, were talking to the deceased. (T118). A confrontation occurred during which both men pulled knives (T120). One, presumably Eden, attacked from the front pushing the knife at the deceased. The witness was unable to say whether it made contact (T118). The other assailant grabbed the decedent from the rear (T196) and knocked him down (T116). Warney alone testified that

⁴Warney is Jenkins' uncle. (169). His credibility was sharply challenged by his failure to give aid or summon assistance. (T164). Warney's cousin, Ulysses Hephern was also present according to Warney but was not produced.

he saw the deceased bleeding as he fled the scene (T121).

No blood was found at the scene (T103).

POINT 1

THE PROSECUTION DENIED THE APPELLANT
DUE PROCESS BY PURPOSELY MISLEADING
HIS ATTORNEY SO AS TO AFFECT HIS TRIAL
TACTICS.

This is the case where there is reasonable doubt whether the defendant committed the crime, United States ex rel Cannon v. Montanye, 486 F.2d 263, 286, (2nd Cir. 1973). Friendly J. Dissenting. Where one witness says there was no stabbing (Linda Townsend), another says there was a stabbing but he does not know who did it (Otis Warney) and the medical examiner gives testimony injecting substantial doubt that the stabbing happened at all at the time and place alleged by the People of the State of New York.

The court below obviously found the matter troublesome, certifying the case to this court on an issue to which it devoted only a paragraph of a six page opinion (App. A-26,27). Relying on United States v. Tropiano, 418 F.2d 1069, 1083 (2d Cir. 1969) and United States v. Russo, 284 F.2d 539, 540 fn. 1) (2nd Cir. 1960) the court held that ". . . it is well established that '[O]ne indicted as a principle may be convicted on evidence that he merely aided and abetted.'"

It is respectfully suggested that the trial court below missed the thrust of the argument pleaded pro se from prison which distinguishes the case at bar from the cases cited.

There is no question that modern criminal pleading

makes no distinction on indictment between principals and aiders and abettors, and if that were all that was before this court, no certificate of probable cause would have been issued. What is at issue is the right of a criminal defendant, at some point in the proceedings to know with some exactitude what it is he is defending against.

This court may take judicial notice that in the Southern and Eastern Districts of New York it is standard practice in pleading to include as part of the indictment notice that the aiding and abetting statute is being invoked. The comments of Justice Kern at trial would seem to indicate that similar notice through specific language is not unusual in the courts of New York (T178-181; T276-278). The advisability of this in basic fairness is not at issue.

Where there is a question as to what theory the prosecution intends to follow the defense may then attempt to discover it by way of a bill of particulars. Cf. United States v. Gottlieb, 493 F.2d 987, 994 (2nd Cir. 1974). This bill would limit the prosecution to what it set forth. United States v. Glaze, 313 F.2d 757 (2nd Cir. 1963) and provide the defendant with the notice necessary to avoid surprise and prepare his case for trial.

Unfortunately, the procedural vicissitudes of the case and the deviousness of the prosecutor created a manifest injustice. No bill of particulars as to the People's theory

was deemed necessary by the defense in the face of the Townsend testimony on preliminary hearing. The defense obviously prepared for trial relying on that as the People's prior proof.

Even this would not be fatal but the prosecutor, who had interviewed Warney, misled everyone at the trial at his opening. It is clear that this was to affect the tactics of the defense. This affirmative deception takes the case out of the realm of the cases cited by the district court and places it under the aegis of the due process clause of the 14th and 5th amendments to the United States Constitution. Cf. Gladden v. Frazier, 388 F.2d 777 (9th Cir. 1968).

Where the prosecutor actively represents the facts on opening to be such that they can only be interpreted by competent counsel and the Court as to charge the defendant acting as a principal, and, where the defense relies on the representation in determining its tactics and is prejudiced thereby, then it would seem that "the controlling question should be the good faith or lack of good faith of counsel in saying what he said in his opening statement and the likelihood that the opening statement was prejudicial to the defendant." Gladden v. Frazier, supra at 779. The opening here should be treated as a bill of particulars which if strayed from with prejudice to the defendant, requires reversal. United States v. Glaze,

supra at 759.

Defense counsel, relying on the opening of the People, and the evidence as he saw it, declined to open. It is clear beyond peradventure that any competent trial lawyer faced with the prospect of the defendant being charged as an aider and abetter would not only have opened, but stressed to the jury at the outset that under that state of facts, Linda Townsend was a defense witness. She stated categorically that only Eden was armed, that the second man rushed across the street after the commencement of the difficulties and that the second man was unarmed. The changes in theory came too late for the defense to make an argument at a vital stage of the proceeding which could have profoundly affected the result. See United States v. San Juan, 545 F.2d 314, 319 (2nd Cir. 1976). Where the defense strategy was determined or even may have been determined by prosecutorial misconduct, or even neglect, a new trial should be ordered. See United States v. Padrone, 406 F.2d 560 (2nd Cir. 1969); United States v. Baum, 482 F.2d 1325 (2nd Cir. 1973).

Trials should not be games of misdirection or artifice. If the burden of reasonable doubt is to mean anything, then prosecutorial authorities must meet that burden by other means than trick and ambush. A defense should be permitted to defend knowingly. In this case, it was the prosecutor's tactic to send the defense down the wrong path

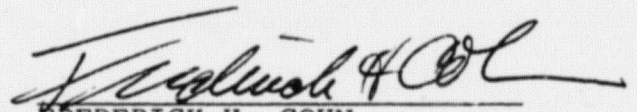
instead of merely presenting facts to the jury in a search for truth.

The court below erred in dismissing the petition because it mistook cases that dealt with slovenly pleading techniques to be applicable to a situation far more serious. An oversight in an indictment may be remedied by alert counsel on both sides before trial. A trap in pleading and opening waylays not only the defendant, but the very appearance of justice.

C O N C L U S I O N

THE DECISION BELOW SHOULD BE REVERSED
AND THE PETITION GRANTED.

Respectfully submitted,


FREDERICK H. COHN
Attorney for Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GEORGETTA BECK, being duly sworn, deposes and
says:

Deponent is not a party to this action, is over
18 years of age and resides at 200 E. 24th St., New York,
N.Y.

On November 30th, 1977 deponent served the within
Brief and Appendix upon Louis J. Lefkowitz, Esq., Attorney
General, Two World Trade Center, New York, New York 10047
the address designated by said attorney for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in an official depository under
the exclusive care and custody of the United States Postal
Service within the State of New York.

Georgetta Beck
GEORGETTA BECK

Sworn to before me this
30th day of November, 1977.

Rachel H. Wolkenstein

Notary Public
RACHEL H. WOLKENSTEIN
Notary Public, State of New York
No. 24-4603639
Qualified in Kings County
Commission Expires March 30, 1978